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Supreme Court U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO: 85-1922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Petitioner,

vs.

RICHARD RAYMOND DeANGELO,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Counsel for Respondent

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STATEMENT OF THE CASE

The Respondent herein supplements Petitioner's Statement of the Case with the following pertinent factual information:

1. Regarding the Respondent's voluntary hospitalization in the matter, it must be emphasized that the Respondent had been shot in the abdomen numerous times with a .357 caliber handgun, the Respondent was also informed that his death was imminent, and he was given the last rites by a priest while at the hospital;

2. It was while in this weakened and extreme physical condition (with its accompanying psychological weakening) that the statements in question were elicited from the Respondent by the use of Gary Leon, the brother of one of the persons killed and an acquaintance of the Respondent. Gary Leon was specifically enlisted by the Oakland Park Police Department to not only learn information, but to ask specific questions and touch upon specific areas in a series of two conversations with the Respondent. It was, in fact, admitted at the trial of the matter that Leon was acting as an agent of the police during these interrogation sessions;

3. Even before the first interrogation session by Leon, the Respondent DEANGELO was already a primary suspect in the case, and as further conceded by the State,

a police officer would have had to advise Respondent DEANGELO of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d. 694 (1966);

4. Although the tape recording of the first interrogation by Leon was inaudible, the officers involved did, in fact, monitor the conversation (while it was being simultaneously recorded) and the officers were able to hear the statements elicited from Respondent DEANGELO and were privy to the inculpatory nature of those statements. The monitoring of the first interrogation session led to further specific questions being given to Gary Leon for a repeat visit to Respondent DEANGELO.

REASONS FOR DENYING JURISDICTION

The initial and most practical reason for denying the Petition for Writ of Certiorari is the fact that this Court, as well as the Eleventh Circuit Court of Appeals and the District Court for the Southern District of Florida, have all denied Petitioner's Motion for Stay of Mandate and/or Extension of Time in regard to this matter. See Appendix, pages 1, 2 and 3.

After rehearing was denied in the instant matter, an extension of time was initially granted by the Eleventh Circuit Court of Appeals, and with the expiration of that extension, the Mandate in the instant case was issued and the further motions were denied.

More importantly, in the Order Denying Extension of time in the Southern District of Florida, it will also be noted that the transcript of the Respondent DENGELO's trial was ordered to be supplied to the Southern District of Florida. Appendix, page 4.

Finally, in this regard, it should be noted that the instant matter is on the docket for the United States District Court for the Southern District of Florida, and an evidentiary hearing is set for Tuesday, October 28, 1986 in Fort Lauderdale, in compliance with the Eleventh Circuit Opinion in the matter. Appendix, page 5.

It is the Respondent's position in this initial regard that all of the Courts in question, including this Court, have seen fit to deny additional time for the State/Petitioner to seek review, and more importantly, the case has progressed, in accordance with the Eleventh Circuit's Opinion, to the point of having the record supplied and the case set for an evidentiary hearing. The evidentiary hearing should proceed, and the Petition for Writ of Certiorari should be denied, consistent with this Court's denial of an extension of time for such Writ.

Similarly, it is the Respondent's position that the Writ of Certiorari should be denied as being prematurely brought before this Court. A perusal of the subject of this appeal, that being the Review and Recommendation of the

Magistrate (page A-19 of Petitioner's Appendix), reveals that the Recommendation and later Order by the District Judge (page A-35 of Petitioner's Appendix) dealt with the presumption of correctness of 28 U.S.C. §2254 as it related to the need for an independent evidentiary hearing. Of course, the upshot of the Review and Recommendation, leading to the appeal in the Eleventh Circuit Court of Appeals, was that the presumption of correctness did apply to the instant matter and that, therefore, an independent evidentiary hearing was not necessary and that the Petition for Habeas Corpus was therefore denied. (Pages A-32 and A-33 of Petitioner's Appendix).

Further, the Magistrate in the Review and Recommendation specifically did not address the merits of Respondent DEANGELO's Motion to Suppress, choosing in fact to rely upon the presumption of correctness to dispose of the question of constitutionality and admissibility of the statements involved. (Page A-32 of Petitioner's Appendix). In the Opinion in question from the Eleventh Circuit Court of Appeals, the Court noted that:

> Although it is not clear whether the District Court accorded the §2254(d) presumption to the trial court's decision that DEANGELO's statements were volunary under Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d. 374 (1966),

> it appears that such was the case. To the extent that the District Court deferred to this presumption, we reverse." Pg. A-6 of Petitioner's Appendix.

The Court Opinion then discusses Stone v. Powell 428 U.S. 465, 96 S.Ct. 3037 49 L.Ed. 2d. 1067 (1976), which was relied upon by the Magistrate in the Review and Recommendation, specifically dealing with whether or not a claim is fully and fairly litigated in the state court, and in light of Miller v. Fenton, __U.S.__, 106 S.Ct. 445, 88 L.Ed. 2nd 405 (1985), the Eleventh Circuit Opinion simply acknowledged the need for an evidentiary hearing regarding the admissiblity of the statements of Respondent DEANGELO:

> Neither the state trial court nor the District Court made any findings as to whether DEANGELO was in custody within the meaning of Escobedo when visited by Gary Leon .... a remand is necessary to determine several crucial facts. Pg. A-13 of Petitioner's Appendix.

Further, the Opinion went on to state that:

> The testimony of Gary Leon is not in the record before us, so it is impossible to determine at this point whether the investigation had focused on DEANGELO at the time of the first or second visit or both ... on remand, these matters should be considered by the District Court on the full record of DEANGELO's trial, followed by written findings of fact and conclusions of law. Pgs. A-16 and A-17 of Petitioner's Appendix.

It is clear from the Opinion of the Eleventh Circuit Court of Appeals that the District Court's Opinion and ruling was reversed for the purpose of affording an evidentiary hearing with a complete finding of fact and conclusion of law which would make further review of the constitutional issues possible - as it is currently impossible under the state of the record at present.

Therefore, the Petitioner's attempt to frame important constitutional issues in the instant Petition are premature, as those issues were not addressed by the Eleventh Circuit Court of Appeals. It is the Respondent's position at this point that a factual determination through

an evidentiary hearing in the District Court would be the next logical and practical step in the history of the instant matter, finally setting a factual groundwork upon which to make findings of law. The supposed constitutional issues raised by the Petitioner are simply not ripe for review by this Court until a factual groundwork is laid and the merits of the Respondent DEANGELO's Motion to Suppress are addressed and decided based upon such factual findings. A review of the matter by certiorari at this point would be based upon speculation as to the outcome of such factual and legal conclusions. It is interesting to note that the Petitioner does not question the fact that the District Court erroneously considered the presumption of correctness in §2254(d) (although in fairness to the Court, was without this Court's holding and clarification in Miller v. Fenton), but the Petitioner chooses instead to ignore the real basis for the Eleventh Circuit Opinion and to instead choose to distract this Court with constitutional issues which have yet to be decided by either the District Court or the Eleventh Circuit Court of Appeals, those issues being merely pinpointed and suggested on remand by the Eleventh Circuit Opinion.

Therefore, it is the Respondent's position that the Petition for Certiorari should be denied at this point as being premature and as having an inadequate basis of fact upon which to be grounded.

Turning to the merits of the case and that aspect of the Petition which requests certiorari review based upon the application of the law to the case at bar, it is the Respondent's position that, notwithstanding the earlier objections, certiorari would be inappropriate in this case as there is no conflict shown between the Opinion in question and existing case law, nor are there substantial novel questions which must be answered by this court. Quite the contrary, the Opinion of the Eleventh Circuit merely reversed the summary dismissal of the Habeas Corpus Petition and remanded the case for further proceedings for necessary factual determinations regarding the statements admitted before the jury. In so remanding, the Eleventh Circuit suggested various points of emphasis to the lower court, to guide the lower court in its further proceedings and to, presumably, eliminate the need for further remand. It is primarily from these guidelines that the Petitioner attempts to formulate a conflict as a basis for certiorari jurisdiction.

It is very clear from a reading of the Eleventh Circuit's Opinion that "whether DEANGELO was in custody,

as was the case in Escobedo, thereby triggering the need for Miranda warnings, obviously is a pivotal question." (Page A-12, Petitioner's Appendix). See Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d. 977 (1964) and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d. 694 (1966).

Similarly, the Opinion went on to note that "neither the State trial court nor the District Court made any findings as to whether DEANGELO was in custody within the meaning of Escobedo when visited by Gary Leon". (Page 813, Petitioner's Appendix).

Finally the court's Opinion again stated that ".... It is impossible to determine at this point whether the investigation had focused on DEANGELO at the time of the first or second visit or both ... this information is pertinent to whether the conversations were custodial interrogations of DEANGELO with a view toward gathering incriminating evidence against him ..." (Pages A-16, A-17 of Petitioner's Appendix). DEANGELO's Fifth Amendment right to remain silent and its parallel right to counsel to ensure such Fifth Amendment right is and always has been the issue in the case. In their Petition, the State confuses the right to counsel, which accompanies the Fifth Amendment right to remain silent, with the attachment of the mandatory right to counsel under the Sixth Amendment.

See pages 19 and 20 of the Petition. The right to counsel guaranteed under the Fifth Amendment is separate and distinct from the Sixth Amendment guarantee. The Fifth Amendment protection against compelled self incrimination provides the right to counsel at custodial interrogations. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d. 378 (1981), page 482; Miranda v. Arizona, supra, page 470; Michigan v. Jackson, __U.S.__, 106 S.Ct. 1404 (1986), page 1407. The Sixth Amendment guarantee of the Assistance of Counsel also provides the right to counsel at post-arraignment interrogations. Michigan v. Jackson, supra, page 1407. In their effort to create a conflict, the State has unfortunately confused these two distinct rights to the assistance of counsel, unfortunately intertwining the Sixth Amendment as was again clarified in United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292 (1984), with the right to counsel supplement to the Fifth Amendment right as is noted in Miranda, Edwards, and Escobedo.

There is absolutely no question that the right to counsel under the Sixth Amendment attaches at the initiation of adversarial judicial proceedings, more specifically, the filing of a formal indictment or information or the appearance at an arraignment, Gouveia, supra, page 187; Jackson, supra, page 1407. It follows that

the Respondent's position is not that the interrogation in question could be carried out only in the presence of an attorney, as it was a critical stage in a post-arraignment situation, see Maine v. Moulton, 474 U.S.__, 106 S.Ct. 477, 88 L.Ed. 2d. 481, (1985), but the position of the Respondent has consistently been that the Respondent was entitled to a Fifth Amendment right not to incriminate himself with the accompanying assistance of counsel.

The Petitioner cites the Eleventh Circuit's Opinion and the Opinions mentioned in the United States v. Henry, 477 U.S. 264, 100 S.Ct. 2183, 65 L.Ed. 2d. 115 (1980), and then the Petitioner concludes that Henry was a case dealing with the Sixth Amendment right to counsel, again misunderstanding the fact that the Eleventh Circuit Opinion was addressing the Fifth Amendment right and the possible circumventing of that Fifth Amendment right and its accompanying right to counsel through the use of a government agent (in Henry's case a cellmate).

If the investigation in question focused upon DEANGELO, and went from investigatory to accusatory, particularly in light of the information learned in the first interview by Gary Leon, DEANGELO had the right to remain silent and had the accompanying right to counsel to help him secure the Fifth Amendment privilege. Miranda, supra, Edwards, supra, Escobedo, supra.

This fact is made all the more clear by the admission of the State that Miranda rights would have been necessary had the police officers spoken directly to DEANGELO. (Page A-11, Appendix of Petitioner). The mere fact that the police officers chose to attempt to circumvent that Fifth Amendment privilege by sending Leon, an agent, instead of a uniformed officer, does not diminish DANGELO's Fifth Amendment privileges at the point when the investigation focused upon him and he was, for all practical purposes, in custody. The dire physical and mental condition of the Respondent at the time of the questioning by Leon cannot be ignored, although this condition was ignored in the Petition for Certiorari. The physical and mental condition of the Respondent at the time of the first and second questionings are very important facts which must be developed at a hearing, as a person facing death (and continuously being told of his condition), lying in a hospital bed with tubes and life supporting mechanisms is clearly not in the same position as a healthy person who walks into the police station voluntarily and gives a statement. Where the police will necessarily feel that they must either arrest the healthy suspect or risk his leaving the jurisdiction, no such formal compulsion faces the officer who has a suspect lying near death in a

hospital room. Just as handcuffing a dying man to his hospital bed will not change his physical condition or his ability to leave at his whim, the mere fact that he may not have been placed formally under arrest after his first or second confession does not change the fact that the police have their man in their control, secure in the knowledge that he cannot physically move.

The questions of custody and interrogation have yet to be adequately determined. However, it is beyond dispute, after a careful reading of the cases cited by the Petitioner, that the legal precedent involved is consistent, the cases and their propositions remain vital, and that there is no conflict between the cases involved and the application of those cases in the Eleventh Circuit Opinion. The mere fact that the Petitioner happens to misread the Eleventh Circuit's Opinion and then misapplies Sixth Amendment cases to a Fifth Amendment situation does not in any way create a conflict and does not somehow provide a jurisdictional foundation for the granting of certiorari review.

Therefore, it is the position of the Respondent that, on the merits of the case involved, there is no conflict which arises from the Eleventh Circuit's Opinion, nor is there even a misapplication of the pertinent legal theories to the case at bar, and therefore certiorari review should be denied in the matter.

CONCLUSION

It is the Respondent's position that certiorari review should be denied in the instant case, as the Mandate has been issued and stays have been denied by the United States Supreme Court, the Eleventh Circuit Court of Appeals and the District Court of Appeals for the Southern District of Florida, and the case has been remanded and is actually set upon the District Court's docket for an evidentiary hearing.

Further, Respondent feels that the Petition should be denied as the issues are not ripe for a decision on the merits without first holding an evidentiary hearing and determining the necessary factual basis upon which to apply the legal theories.

Finally, the merits of the case do not lend themselves to certiorari review, as there are no conflicts which arise from the Eleventh Circuit Court of Appeals Opinion as it is applied to the cases cited therein, and, as a matter of fact, Petitioner misconstrues some of the cases cited in the Petition, and in so doing, confuses the Fifth Amendment right to remain silent and its accompanying right to counsel as opposed to the Sixth Amendment right to counsel which attaches after formal charging documents have been filed.

Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL D. GELETY
Attorney for Respondent
1700 East Las Olas Boulevard
Suite 300
Ft. Lauderdale, Fla. 33301
(305) 462-4600

CASE NO: 85-1922

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Petitioner,

vs.

RICHARD RAYMOND DEANGELO,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

PROOF OF SERVICE

I HEREBY CERTIFY that three copies of the opposition of the Respondent to the Writ for Certiorari were furnished by United States Mail to the Attorney General's Office for the state of Florida at 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401 on this 1st day of October, 1986.

MICHAEL D. GELETY

****

APPENDIX

****

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

May 7, 1986

Penny H. Brill, Esquire
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33401

Re: Louie L. Wainwright, Secretary, Florida Department of Corrections v. Richard Raymond DeAngelo, A-843

Dear Ms. Brill:

Your application to continue a stay pending appeal in the above-entitled case has been presented to Justice Powell, who has endorsed thereon the following:

"Denied
5/7/86
L.F.P., Jr."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Edward L. Turner, Jr.
Assistant Clerk

vjr

cc: Michael D. Gelety, Esq.
1700 East Las Olas Boulevard
Suite 300
Ft. Lauderdale, FL 33301

MAY 1? 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5140

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY - 1986
SPENCER D. MERCER
CLERK

RICHARD RAYMOND DeANGELO,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

O R D E R:

The motion of respondent-appellee made by and through his counsel for enlargement of time staying the mandate beyond May 5, 1986, is DENIED. See Fed. R. App. P. 41.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6652-Civ-ROETTGER

RICHARD DE ANGELO, :

Petitioner, :

vs. :

LOUIE WAINWRIGHT, :

Respondent. :

O R D E R

THIS CAUSE is before the Court on the Motion of Respondent to stay proceedings pending disposition by the United States Supreme Court of the respondent's Petition for Writ of Certiorari.

Owing to the respondent's delayed filing of his Petition for Writ of Certiorari, the Eleventh Circuit Court of Appeals issued its mandate on May 8, 1986 remanding the case to this Court. This Court is directed to consider the full record of the petitioner's trial, followed by written findings of fact and conclusions of law. DeAngelo v. Wainwright, 781 F.2d 1516, 1520 (11th Cir. 1986).

The United States Supreme Court did not dispose of respondent's petition before the end of its term. To avoid further delay in these proceedings, it is hereby

ORDERED that the respondent's Motion to Stay is

denied and it is further

ORDERED that the respondent shall provide to this Court a copy of the transcript of the petitioner's trial on or before August 27, 1986, so that the Court can comply with the mandate of the Eleventh Circuit Court of Appeals.

DONE AND ORDERED at Fort Lauderdale, Florida, this 24th day of July, 1986.

Lurana S. Snow
UNITED STATES MAGISTRATE
LURANA S. SNOW

Copies to:

Michael D. Gelety, Esq.
1700 East Las Olas Boulevard
Fort Lauderdale, FL 33301

Georgina Jimenez-Orosa, Esq.
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, FL 33401

NOTICE OF EVIDENTIA HEARING D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

RICHARD DE ANGELO,
Petitioner,
v.
LOUIE WAINWRIGHT,
Respondent.

No. 82-6652-Civ_ROETTGER

TAKE NOTICE that the above-entitled case has been set for hearing at 10:00 a.m., on Tuesday, October 28, , 1986, at Courtroom 203B, 299 East Broward Blvd., Ft. Lauderdale, FL 33301.

Date October 6, 1986, 19

LURANA S. SNOW
Clerk
U.S. MAGISTRATE
By Deputy Clerk.

To
Richard DeAngelo, #068779
Avon Park Correctional Institution
P.O. Box 1100
Avon Park, FL 33825

Michael D. Gelety, Esq.
1700 East Las Olas Blvd., Suite 300
Ft. Lauderdale, FL 33301

Georgina Jimenez-Orosa, Asst. Attorney General
111 Georgia Ave. - Room 204
West Palm Beach, Florida 33401

OCT 7 1986

FRI M1—5 24 72 IN PADS-7894

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6652-Civ-ROETTGER

RICHARD DE ANGELO, :

Petitioner, :

vs. :

LOUIE WAINWRIGHT, :

Respondent. :

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

TO: SUPERINTENDENT of Avon Park Correctional Institution
Avon Park, Florida

IT APPEARING that the above named Richard DeAngelo is confined in Avon Park Correctional Institution, and a hearing is set in this cause at Fort Lauderdale, Florida, on October 28, 1986, and that it is necessary for the above named Richard DeAngelo to be before this Court for the purpose of giving testimony,

NOW, THEREFORE, this is to command you, the Warden of Avon Park Correctional Institution, that you have the body of the said Richard DeAngelo now in custody as aforesaid, under safe and secure conduct, before this Court at Fort Lauderdale, Florida by or before 10:00 a.m., on October 28, 1986.

DONE AND ORDERED at Fort Lauderdale, Florida, this 8th day of October, 1986.

Lurana S. Snow
UNITED STATES MAGISTRATE
LURANA S. SNOW

Copies to:

Michael D. Gelety, Esq.
1700 East Las Olas Boulevard
Fort Lauderdale, FL 33301

Georgina Jimenez-Orosa, Esq.
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, FL 33401

Warden, Avon Park Correctional
Institution (2 certified copies)